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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)

KUKIO UTILITY COMPANY, LLC )

DOCKET NO. 01-0433

)  
For a Certificate of Public )  
Convenience and Necessity Pursuant )  
to Section 269-7.5, Hawaii Revised )  
Statutes, to Provide Water and )  
Sewage Treatment Services in Kukio, )  
North Kona, Hawaii; Approval of )  
Water Purchase Agreement with )  
WB Kukio Resorts, LLC Pursuant to )  
Section 269-19.5, Hawaii Revised )  
Statutes; and for Approval of )  
Rules, Regulations and Rates. )  
\_\_\_\_\_)

ORDER NO. 20688

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2003 NOV 28 P 4:05

Filed November 26, 2003

At 9 o'clock A. .M.

Kirk  
for Chief Clerk of the Commission

ATTEST: A True Copy

KAREN HIGASHI

for Chief Clerk, Public Utilities  
Commission, State of Hawaii.

Kai

OF THE STATE OF HAWAII

KUKIO UTILITY COMPANY, LLC

Order No. 20688

I.

Motion for Reconsideration and/or Clarification  
of Portions of Decision and Order No. 20103

On June 16, 2003, KUKIO UTILITY COMPANY, LLC, ("Kukio") moved the commission for a reconsideration and/or clarification of portions of Decision and Order No. 20103, filed on March 27, 2003 ("Decision"), in which the commission ruled, among other things, that (1) Kukio's proposed non-potable irrigation water service should be regulated by the commission, and (2) the commission could not approve of the method by which the utility assets will be transferred to Kukio by WB Kukio Resorts, LLC ("Developer"), and could not confirm that said transfer will be deemed for value and not a contribution in aid of construction ("Motion for

Reconsideration").<sup>1</sup> Kukio makes its Motion for Reconsideration pursuant to Hawaii Administrative Rules ("HAR") § 6-61-137.

Kukio also requests that the commission grant it leave to introduce additional information and evidence along with its Motion for Reconsideration. We will review this request pursuant to HAR § 6-61-139.

## II.

### Procedural History

On October 26, 2001, Kukio filed an application requesting a certificate of public convenience and necessity ("CPCN") to provide water and wastewater treatment services in the area of North Kona, Hawaii.<sup>2</sup> On December 13, 2002, the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS ("Consumer Advocate"), filed its statement of position ("SOP") in which it did not object to the commission's approval of Kukio's

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<sup>1</sup>On April 7, 2003, Kukio filed a Motion to Enlarge Time for Filing Motion for Reconsideration and/or Clarification of Decision and Order No. 20103 and Motion to Stay Portions of Part IV, Subparts 4 and 5 of Decision and Order No. 20103 ("Motion to Enlarge Time"). The commission granted Kukio's Motion to Enlarge Time, by Order No. 20122, filed on April 14, 2003. On April 23, 2003, Kukio filed a motion to further enlarge the time to file a motion for reconsideration and/or clarification ("Motion to Further Enlarge Time"). The commission granted Kukio's Motion to Further Enlarge Time, by Order No. 20170, filed on May 7, 2003. On May 14, 2003, Kukio filed a final motion to enlarge time to file for reconsideration and/or clarification ("Final Motion to Enlarge Time"). The commission granted Kukio's Final Motion to Enlarge Time, until June 16, 2003, by Order No. 20207, filed on May 29, 2003. On June 16, 2003, Kukio filed its Motion for Reconsideration.

<sup>2</sup>On September 11, 2002, Kukio filed its First Amended Application in the instant docket. On February 13, 2003, Kukio withdrew its First Amended Application, relying solely on the original application filed on October 26, 2001.

application. In doing so, it determined that if Kukio were allowed to operate the irrigation operations as an unregulated business, the commission should require Kukio to maintain accurate and complete records that would allow regulators and the Consumer Advocate an opportunity to verify reasonable allocation methods and results. The Consumer Advocate also concluded that there was insufficient documentation by Kukio to conclude that the plant facilities were reasonable for ratemaking purposes.

On March 27, 2003, the commission issued its Decision, in which it ordered, in relevant part, (1) that Kukio's proposed non-potable irrigation water service should be regulated, and (2) that it did not have sufficient information with which to make a decision on Kukio's request that the transfer of utility assets from Developer to Kukio should be deemed for value, and not a contribution in aid of construction, and that the commission would defer this decision to Kukio's next rate proceeding. These portions of the Decision are the subject of the instant Motion for Reconsideration.

On June 23, 2003, the Consumer Advocate requested that the commission grant it additional time, until July 7, 2003, to file a response to Kukio's Motion for Reconsideration. Pursuant to HAR § 6-61-140, the commission granted this request, by Order No. 20293, filed on July 2, 2003. The Consumer Advocate filed its Response to Kukio Utility Company, LLC's Motion for Reconsideration ("Response") on July 7, 2003.

### III.

#### Summary of Parties' Position

##### A.

##### New Evidence

Kukio requests that the commission allow it to introduce additional information in connection with its Motion for Reconsideration. Affidavits from its authorized representative and outside regulatory accountant endeavored to show (1) why Kukio's non-potable irrigation water service should remain unregulated, and (2) why the transfer of assets from the Developer to Kukio should be deemed for value, and not a contribution in aid of construction. The Consumer Advocate states that (1) little new information was provided in the Motion for Reconsideration that was not included in the initial application and (2) the concerns presented in its SOP have not been alleviated by any new information or evidence presented in the Motion for Reconsideration. Despite this, however, the Consumer Advocate does not object to Kukio's request to admit additional information.

##### B.

##### Non-Potable Irrigation Water

Kukio contends that the non-potable irrigation water system should not be subject to commission oversight or regulation because it will provide services solely to affiliated entities, and not to the public, and that (1) rate cross-subsidization, a concern raised by the Consumer Advocate and in the commission's Decision, is not an issue until Kukio's next rate case, and (2) prior to the

next rate case, the KI Wells<sup>3</sup> and related non-potable irrigation water facilities will be customer-owned.

At this juncture, the Consumer Advocate does not object to granting Kukio's request to treat the non-potable irrigation water service as an unregulated activity, provided that Kukio should be required to maintain accurate and complete financial records. The Consumer Advocate recommends that Kukio be required to make such financial records available to the commission and Consumer Advocate to ensure that improper cross-subsidization does not occur.

C.

Treatment of Assets

Kukio has provided a revised utility plant amount (reduced from \$8,000,000 to \$7,202,070) and detailed a total of \$5,855,678 that will not be included in rate base, to justify its request regarding the recognition of some amount of utility assets in Kukio's rate base. However, the Consumer Advocate maintains that Kukio has not adequately addressed the concerns raised in the SOP and Decision. It is willing to review any updated information

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<sup>3</sup>The KI Wells are owned by the Developer and currently service the potable and non-potable water needs of Phase 1 of the master planned community, Kukio Beach Club.

that Kukio has to offer in support of its request for reconsideration of the commission's treatment of Kukio's utility assets.<sup>4</sup>

#### IV.

##### Discussion

##### A.

##### Kukio's Request to Introduce New Evidence

HAR § 6-61-139 provides that any new evidence introduced in a motion for reconsideration shall be stated briefly, shall not be cumulative, and shall include an explanation why that evidence was not previously offered. In its discussion of the treatment of the transfer of utility assets to the Developer from Kukio, the Consumer Advocate notes in its SOP that "[Kukio] has not provided much more beyond what was already provided in its original application or in response to discovery".<sup>5</sup> Moreover, the Consumer Advocate observes that much of the new information presented with the Motion for Reconsideration "could, or should, have been provided with the application or in response to discovery requests".<sup>6</sup> However, the Consumer Advocate does not object to the

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<sup>4</sup>The Consumer Advocate says that at a minimum, this information should include the total cost of construction, the calculations and assumptions used to derive this total construction cost, calculations and assumptions made in deriving the total project costs (identified by Kukio as \$5,855,678) and copies of income tax returns and/or financial statements to clearly demonstrate that only \$5,855,678 was written off as part of the real estate development cost.

<sup>5</sup>See SOP at 8.

<sup>6</sup>Id. at 11.

commission considering this information and evidence in support of Kukio's Motion for Reconsideration.

We agree with the Consumer Advocate that the new information provided with Kukio's Motion for Reconsideration should have been submitted with its original application, or at least submitted in response to information requests from the Consumer Advocate. We also agree with the Consumer Advocate that the new evidence submitted by Kukio does little to support Kukio's Motion for Reconsideration. We recognize, however, that the commission is not bound by the common law rules relating to the admission or rejection of evidence, and that the commission may exercise its own discretion in these matters, with a view to doing substantial justice. HAR § 6-61-43. It is toward that view of doing substantial justice in considering Kukio's Motion for Reconsideration that we, thus, conclude that Kukio's request to allow additional evidence should be approved.

B.

Motion for Reconsideration

The standard for granting a motion for reconsideration is established in HAR § 6-61-137, which provides that a movant must set forth specific grounds on which the movant considers the decision or order to be unreasonable, unlawful, or erroneous. We apply this standard to Kukio's Motion for Reconsideration.

We agree with the Consumer Advocate's recommendation and find that Kukio's proposed non-potable irrigation water service can be treated as unregulated provided Kukio is required to maintain

accurate and complete financial records of all costs incurred for the irrigation service, including the allocation procedures for all common costs. This requirement will allow the commission and Consumer Advocate to review the costs incurred for reasonableness, and would help in mitigating any concerns regarding improper cost allocations, as discussed in the Decision. As a result, we also find that Kukio's proposed non-potable irrigation water service should not be subject to any tariff requirements. We conclude, thus, that Kukio's Motion for Reconsideration of that portion of the Decision relating to the regulation of the non-potable water irrigation service, should be granted.

At this time, Kukio's proposed non-potable irrigation water service will be treated as unregulated as long as the facts presented and representations made to the commission in this docket remain true and accurate. We do expect, however, that Kukio keep the commission and the Consumer Advocate informed as to any changes in circumstances relating to its proposed non-potable irrigation water service (e.g., any transfer of control).

With regard to that portion of the Decision relating to the transfer of utility assets and its treatment as either for value, or as a contribution in aid of construction, we find that Kukio has not provided any additional evidence to alleviate our concerns regarding the treatment of these funds, and to thus, modify our order as set forth in the Decision. We, thus, conclude that Kukio's request that the commission reconsider that portion of the Decision relating to the proposed transfer of utility assets from the Developer to Kukio, should be denied.

V.

Orders

THE COMMISSION ORDERS:

1. Kukio's Motion for Reconsideration is denied, in part, and granted, in part, subject to the terms and conditions of this order and more specifically discussed below.

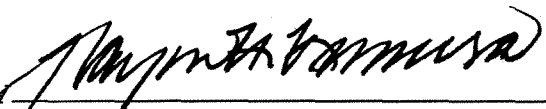
- a. Kukio's request to introduce new evidence, pursuant to HAR § 6-61-139, filed in its Motion for Reconsideration on June 16, 2003, is approved.
- b. Kukio's request that its proposed non-potable irrigation water service be considered an unregulated activity, filed in its Motion for Reconsideration on June 16, 2003, is approved.
- c. Kukio shall maintain accurate records of the irrigation service, including allocation procedures for those costs charged to both regulated and non-regulated operations, and shall make those records available to the commission and the Consumer Advocate for review.
- d. Kukio's request that the commission reconsider its determination that the utility assets being transferred from Developer to Kukio be deemed for value, and not a contribution in aid of construction, filed in its Motion for Reconsideration on June 16, 2003, is denied.


2. Decision and Order No. 20103 is modified consistent with the terms and conditions of this order. In all other respects, Decision and Order No. 20103 remains unchanged.

DONE at Honolulu, Hawaii this 26th day of November, 2003.

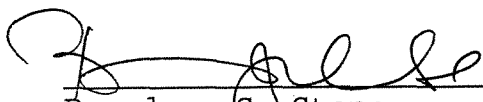
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Carlito P. Caliboso, Chairman

By   
Wayne H. Kimura, Commissioner

By   
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

  
Benedyne S. Stone  
Commission Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Order No. 20688 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: November 26, 2003